STATE OF MAINE
SUPREME JUDICIAL COURT

In The Matter Of Request For Opinion Of The Justices	)	Docket No. OJ–15–1

AMICUS CURIAE BRIEF OF INTERESTED PERSON PETER BRANN

Peter J. Brann
BRANN & ISAACSON
184 Main Street, P.O. Box 3070
Lewiston, ME 04243–3070
(207) 786–3566
pbrann@brannlaw.com

Attorneys for Interested Person

TABLE OF CONTENTS

Introduction 1

ARGUMENT 3

I. THE JUSTICES RESPECTFULLY SHOULD DECLINE TO ANSWER THE GOVERNOR'S QUESTIONS 3

II. ALTERNATIVELY, THE JUSTICES SHOULD ANSWER BOTH OF THE GOVERNOR'S QUESTIONS IN THE AFFIRMATIVE 9

A. The Law Court Has Held That The Attorney General Has Broad Discretion To Control State Litigation Based On Her Determination Of The Public Interest 9

B. The Executive Branch Must Obtain The Attorney General's Permission To Hire Outside Counsel To Represent A State Agency In A Lawsuit 16

C. The Attorney General Does Not Forfeit Her Statutory And Common Law Responsibilities Over Litigation When She Intervenes To Oppose A State Agency 18

CONCLUSION 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases

Banta v. Clark, 398 N.E.2d 692 (Ind. Ct. App. 1979) 17

County of Santa Clara v. Superior Court, 50 Cal. 4th 35, 112 Cal. Rptr. 3d 697, 235 P.3d 21 (2010) 22

Feeney v. Commonwealth, 373 Mass. 359 N.E.2d 1262 (1977) 13, 14, 15

Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 12

FPL Maine Hydro Energy LLC v. Dep't of Envirn. Protection, 2007 ME 97, 926 A.2d 1197 22

Frohnmayer v. State Accident Ins. Fund Corp., 294 Or. 570, 660 P.2d 1061 (1983) 17

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) 13

Lund ex rel. Wilbur v. Pratt, 308 A.2d 554 (Me. 1973) 10

Mayhew v. Burrell, 772 F.3d 80 (1st Cir. 2014) ..... *passim*

Opinion of the Justices, 132 Me. 491, 167 A. 176 (1933) 3

Opinion of the Justices, 134 Me. 510, 191 A. 487 (1936) 4, 21

Opinion of the Justices, 155 Me. 125, 152 A.2d 494 (1959) 7

Opinion of the Justices, 157 Me. 152, 170 A.2d 652 (1961) 8, 9

Opinion of the Justices, 2002 ME 169, 815 A.2d 791 4

Opinion of the Justices, 2004 ME 54, 850 A.2d 1145 4

Opinion of the Justices, 2012 ME 49 A.3d 930 ..... 3, 4, 7, 21

Opinion of the Justices, 226 Mass. 613, 115 N.E. 978 (1917) 9

Opinion of the Justices, 281 A.2d 321 (Me. 1971) 5

Opinion of the Justices, 330 A.2d 912 (Me. 1975) 4, 6

Opinion of the Justices, 383 Mass. 895, 424 N.E.2d 1092 (1981) 3

Opinion of the Justices, 396 A.2d 219 (Me. 1979) 17

Opinion of the Justices, 460 A.2d 1341 (Me. 1982) ..... *passim*

Opinion of the Justices, 673 A.2d 693 (Me. 1996) 7

Opinion of the Justices, 709 A.2d 1183 (Me. 1997) 3, 7

Sec'y of Administration and Finance v. Attorney General, 367 Mass. 154, 326 N.E.2d 324 (1975) 11, 13, 17

State v. Lead Industries Assoc., Inc., 951 A.2d 428 (R.I. 2008) 12, 22

Superintendent of Insurance v. Attorney General, 558 A.2d 1197 (Me. 1989) ..... *passim*

Constitutional Provisions

Me. Const. art. VI, § 3 ..... 1, 4, 7

Statutes

5 M.R.S. § 191 1

5 M.R.S. § 191(3) 16

5 M.R.S. § 191(3)(B) 16, 20

Rules

Sup. Ct. R. 12(3) 19

Sup. Ct. R. 12(6) 19

Sup. Ct. R. 15(1) 19

Other Authorities

Jeremy R. Girton, *The Attorney General Veto*, 114 Colum. L. Rev. 1783 (2014) 13

Katherine Shaw, *Constitutional Nondefense in the States*, 114 Colum. L. Rev. 213 (2014) 13

Leah Godesty, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?* 42 Colum. J.L. & Soc. Probs. 587 (2009) 22

William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive*, 115 Yale L.J. 2445, 2449 (2006) 10, 11, 13, 15

Introduction

On January 23, 2015, the Governor sent to the Chief Justice a letter ("Governor's Letter"), requesting an Opinion of the Justices on two questions:

1. If the Attorney General refuses to represent a State agency (or any other entity listed in 5 M.R.S. § 191) in a lawsuit, must the Executive Branch still obtain the Attorney General's permission to hire outside counsel to represent the agency in the suit?

2. If the Attorney General intervenes to oppose a State agency in a lawsuit, must the Executive Branch still allow the Attorney General to direct that piece of litigation?

On January 26, 2015, the Chief Justice invited the Governor's Office, the Attorney General's Office, and any interested person or entity to submit briefs addressing whether the Governor's questions constitute a "solemn occasion" under the Maine Constitution, *see* Me. Const. art. VI, § 3, and whether the Governor's questions should be answered affirmatively or negatively. The undersigned submits this *amicus curiae* brief as an "interested person" on both the procedural and substantive issues.

The undersigned was an Assistant Attorney General and then State Solicitor in the Attorney General's Office between 1981 and 1999, representing the Governor and executive agencies in numerous matters. Additionally, the undersigned was the principal counsel for the Attorney General's Office in *Opinion of the Justices*, 460 A.2d 1341 (Me. 1982), which addressed, among other things, the propriety of issuing an Opinion of the Justices.

Since 1999, the undersigned has been an associate and now a partner at Brann & Isaacson, which has been hired as outside counsel on behalf of the State, with the Attorney General's written approval, in a number of matters, and has been adverse to the State and the Attorney General's Office in a number of other matters. Additionally, as part of a national practice, the undersigned has been both retained by, and adverse to, the Attorney General's Offices in numerous other States.

Since 2010, the undersigned has been an Adjunct Lecturer in Law at Columbia Law School, co–teaching a seminar entitled "The Role of the State Attorney General." Beginning in 2013, the undersigned has also been a Guest Lecturer co–teaching the same class at Harvard Law School. These classes consider cases and academic commentary from around the country that address the issues that lie at the heart of the Governor's questions—what is the role of the Attorney General, and what happens when the Governor and the Attorney General disagree, as they inevitably will on occasion, about the proper direction of litigation.

Having litigated on behalf of the Attorney General, having litigated against the Attorney General, and having studied and taught the role of the Attorney General, the undersigned believes that for all the criticism this and other Governors may heap on the Attorney General's exclusive control of litigation, it is the only sensible solution. Or, as Winston Churchill reputedly said, "It has been said that democracy is the worst form of government except all the others that have been tried." Stated differently, the Law

Court got it exactly right in *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197 (Me. 1989), and the Justices should not, and indeed cannot, overturn that decision in an Opinion of the Justices.

ARGUMENT

I. THE JUSTICES RESPECTFULLY SHOULD DECLINE TO ANSWER THE GOVERNOR'S QUESTIONS.

Constitutional Standard. When "the Governor requests an advisory opinion of the Justices, 'we must first determine whether we have the constitutional authority to answer the questions.'" *Opinion of the Justices*, 2012 ME 49, ¶ 4, 40 A.3d 930, 932 (quoting *Opinion of the Justices*, 709 A.2d 1183, 1185 (Me. 1997)).

> [T]he boundaries set by the Constitution on our duty to furnish opinions are jurisdictional in nature and must be strictly observed in order to preserve the fundamental principle of the separation of the judicial from the executive and legislative branches of government.

Opinion of the Justices, 460 A.2d 1341, 1345–46 (Me. 1982) (brackets added by Justices and quoting *Opinion of the Justices*, 383 Mass. 895, 916, 424 N.E.2d 1092, 1106 (1981) (other citation omitted)). "It is well established that the Justices will not answer a request made by one branch of government for an advisory opinion regarding the power, duty, or authority of another branch." *Opinion of the Justices*, 460 A.2d at 1349 (citing *Opinion of the Justices,* 132 Me. 491, 497, 167 A. 176, 179 (1933)).

"We provide advisory opinions only 'upon important questions of law, and upon solemn occasions.'" *Opinion of the Justices*, 2012 ME 49, ¶ 5, 40 A.3d at 932 (quoting

Me. Const. art. VI, § 3). "A solemn occasion arises 'when questions are of a serious and immediate nature, and the situation presents an unusual exigency.'" *Opinion of the Justices*, 2012 ME 49, ¶ 5, 40 A.3d at 932 (quoting *Opinion of the Justices,* 2004 ME 54, ¶ 3, 850 A.2d 1145). "The determination that a solemn occasion exists 'is of significant import, and we will not find such an occasion to exist except in those circumstances when the facts in support of the alleged solemn occasion are clear and compelling.'" *Opinion of the Justices*, 2012 ME 49, ¶ 5, 40 A.3d at 932 (quoting *Opinion of the Justices,* 2002 ME 169, ¶ 8, 815 A.2d 791).

"[W]e will not answer questions that are tentative, hypothetical and abstract." *Opinion of the Justices*, 2012 ME 49, ¶ 5, 40 A.3d at 932 (brackets added by Justices and quoting *Opinion of the Justices*, 2002 ME 169, ¶ 8, 815 A.2d 791). Since at least the administration of Governor Louis Brann, "[t]he matters with regard to which advisory opinions are proper are those of instant, not past nor future, concern; things of live gravity." *Opinion of the Justices*, 134 Me. 510, 513, 191 A. 487, 488 (1936) (brackets added). Thus, the Justices routinely decline to answer questions "[i]n such situations [when] the prospective gubernatorial action is at a stage yet too tentative, hypothetical and abstract to have achieved the 'live gravity' necessary for the existence of a 'solemn occasion.'" *Opinion of the Justices*, 330 A.2d 912, 915 (Me. 1975) (citing *Opinions of the Justices* from 1936, 1969, and 1971) (brackets added). Applying these standards, "[t]here is nothing

here of live gravity." *Opinion of the Justices*, 281 A.2d 321, 324 (Me. 1971) (brackets added).

No Solemn Occasion. According to the Governor, the Justices should answer his questions because the Maine Department of Health & Human Services ("Department") "is faced with deadlines for submitting its petition for *certiorari* in *Mayhew v. Burrell*." Governor's Letter at 3. That deadline, however, presents no exigent controversy.

In February 2014, the Department sought to appeal an adverse administrative ruling from the U.S. Department of Health & Human Services to the U.S. Court of Appeals for the First Circuit. Governor's Letter, Exhibit 1 at 1. The Attorney General responded to the request, declining to represent the Department on the grounds that "the appeal is moot and lacks substantial legal merit." *Id*. at 3. The Attorney General continued, however, that she "would consider approving a request for outside counsel with any reasonable proposals from any non–conflicted firms or individual attorneys admitted to practice in the First Circuit Court of Appeals." *Id.*

With the written approval of the Attorney General, the Governor then retained well–respected Maine counsel to represent the Department in the First Circuit appeal. *See* Governor's Letter at 2. The Attorney General intervened in the appeal on the side of the federal respondent. The docket does not indicate any opposition from the Department to the Attorney General's motion to intervene. *See Mayhew v. Burrell*, No. 14–1300 (1st Cir. June 18, 2014) (Order granting motion to intervene).

As predicted by the Attorney General, the Department lost its appeal on the merits. *Mayhew v. Burrell*, 772 F.3d 80 (1st Cir. 2014). The Department now would like to petition for *certiorari* to the U.S. Supreme Court, and that petition is currently due in mid–February 2015. *See* Governor's Letter at 2. The Department returned to the Attorney General to seek approval to retain outside counsel to file the petition. On January 14, 2015, the Attorney General approved that request. Governor's Letter, Exhibit 2.

Thus, the claimed serious and immediate exigency that gave rise to the Governor's questions, namely, the need to retain outside counsel to file a petition for *certiorari* in *Mayhew v. Burrell*, was resolved even before the Governor sought an Opinion of the Justices. The Governor's concerns about what might happen if the Supreme Court eventually grants the petition for *certiorari*—a statistically unlikely event because the Court takes about 70 cases a year out of about 7,000 petitions—is likewise "too tentative, hypothetical and abstract to have achieved the live gravity necessary for the existence of a 'solemn occasion.'" *Opinion of the Justices*, 330 A.2d at 915 (citation omitted).

Although the Governor mentions in passing another pending lawsuit, *see* Governor's Letter at 3 (citing *Maine Municipal Association v. Maine Department of Health & Human Services*), virtually no details are provided. Nevertheless, it appears to be another case in which the Governor sought, and the Attorney General approved, a

request to retain outside counsel. *See id*. "We have consistently declined to answer questions as to which we cannot determine 'the exact nature of the inquiry.'" *Opinion of the Justices*, 460 A.2d at 1346 (quoting *Opinion of the Justices,* 155 Me. 125, 141, 152 A.2d 494, 501 (1959) (other citation omitted)).

In any event, the Governor asserts, "[a]t issue is the legal representation refused by the Attorney General in the matter of *Mayhew v. Burrell*." Governor's Letter at 1. Thus, the Justices need only conclude that this issue does not "concern a matter of live gravity and unusual exigency" to decline to respond to the Governor's questions. *Opinion of the Justices*, 2012 ME 49, ¶ 6, 40 A.3d at 932 (citing *Opinion of the Justices*, 709 A.2d at 1185).

Binding Precedent. In this instance, there is yet another reason to decline to answer the Governor's questions. It has often been observed that "'opinions propounded pursuant to section 3, article VI of the Constitution of Maine are not binding decisions of the Supreme Judicial Court,' but rather are opinions of the individual Justices." *Opinion of the Justices*, 2012 ME 49, ¶ 4, 40 A.3d at 932 (brackets omitted and quoting *Opinion of the Justices,* 673 A.2d 693, 695 (Me. 1996)). The Governor's questions present the mirror image of that issue, namely, whether it is proper to issue an Opinion of the Justices when there is prior, binding precedent from the Law Court. The answer is simple: "No."

When asked to offer an opinion on the constitutionality of a milk statute when the Law Court had previously declared two similar statutes unconstitutional, the Justices declined to offer an opinion, observing:

> *Each justice in giving his advisory opinion must necessarily be bound by the existing law under the decided cases of the Court*. He cannot, any more than if he were sitting as a single justice to hear and decide a case, or were a judge of any other court, or a member of any other tribunal, do other than accept the decision of the Supreme Judicial Court sitting as the Law Court, except, of course, insofar as the laws of the United States or the decisions of the Supreme Court of the United States might control. *When, as here, the issue has been clearly determined, he should not indicate what his views may be, or, indeed whether he has views, upon the existing validity of the settled law*.

Opinion of the Justices, 157 Me. 152, 159, 170 A.2d 652, 656 (1961) (emphasis added). The Justices noted further that "[t]his is not the occasion to write at length on the advantages and disadvantages of advisory opinions." *Id.* (brackets added). "It is sufficient to note that however useful such opinions may be as a guide in proposed actions, they do not replace, and are not designed to replace, or to be a substitute for, decisions made in the course of litigation." *Id.* at 159–60, 170 A.2d at 656. In reaching that conclusion, the Justices, once again, turned to Massachusetts:

> It is established also that in answering questions submitted to them under chapter III, article II, of the Constitution, *the Justices of this court are bound by the decisions of the court upon matters respecting which that court is the final authority. It is not open to the Justices in answering questions submitted to them under the Constitution to attempt to overrule a decision made by the court in a cause between party and party or to speculate upon the correctness of such a decision*. If such a decision is to be overruled, it can be only after argument in another cause between party and party, where the rights of all can be fully guarded. It cannot be overturned by an advisory opinion of the Justices given without the benefit of argument. *Without intimating that*

> *there is ground to question our decisions, it is enough to say that we are bound by them*.

Id. at 160, 170 A.2d at 656 (emphasis added and quoting *Opinion of the Justices*, 226 Mass. 613, 616, 115 N.E. 978, 979 (1917)).

The Governor's questions run directly into the brick wall of *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197 (Me. 1989) ("*Superintendent*"). In that case, the Law Court had to address the role of the Attorney General vis-à-vis the Executive Branch, ruling on the Attorney General's obligation to represent Executive Branch agencies, the Attorney General's control of litigation, and the propriety of the Attorney General intervening in court to oppose positions taken by Executive Branch agencies after advising those Executive Branch agencies. As will be discussed below, the affirmative answers to both of the Governor's questions largely can be found in *Superintendent*. Accordingly, the Justices should not offer *any* opinion on the Governor's questions in the face of binding precedent from *Superintendent*.

II. ALTERNATIVELY, THE JUSTICES SHOULD ANSWER BOTH OF THE GOVERNOR'S QUESTIONS IN THE AFFIRMATIVE.

A. The Law Court Has Held That The Attorney General Has Broad Discretion To Control State Litigation Based On Her Determination Of The Public Interest.

To answer the Governor's questions, we start with the role of the Attorney General found by the Law Court in *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197 (Me. 1989). Once we consider the Attorney General's long–standing role to

act in what she determines to be the public interest, the answers to the Governor's questions become self–evident.

Over a generation ago, the Law Court held that the Attorney General had sweeping common law powers:

> The Attorney General, in this State, is a constitutional officer endowed with common law powers. See, Constitution of Maine, Article IX, Section 11. As the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and *the protection of public rights.*

Lund ex rel. Wilbur v. Pratt, 308 A.2d 554, 558 (Me. 1973) (emphasis added by Court and quoted in *Superintendent*, 558 A.2d at 1199). In short, the Attorney General is the State's "chief law officer" responsible for taking actions she "deems necessary" for "the protection of public rights." *Id*.

"As the historical successor to the English Attorney General, the Attorney General in Maine, as well as in other states, is vested with considerable discretion and autonomy." *Superintendent*, 558 A.2d at 1199. "The roots of the Office of the Attorney General date back to the thirteenth century, when English kings appointed attorneys to represent regal interests in each major court or geographical area." William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive*, 115 Yale L.J. 2445, 2449 (2006) (footnote omitted). "By the end of the seventeenth century the office, held by such eminent lawyers as Coke and Bacon, had

achieved the importance and breadth of authority we associate with it today." *Sec'y of Administration and Finance v. Attorney General*, 367 Mass. 154, 159–60, 326 N.E.2d 324, 337 (1975) ("*Sec'y of Administration*") (citation omitted) (cited in *Superintendent*, 558 A.2d at 1200).

> Importantly, during this period, the Attorney General established that his duty of representation extended to the public interest and not just to the ministries of government. In fact, by 1757, the Attorney General was able to refuse "to prosecute or to stop a prosecution on the orders of a department of the government, if he disapproved of this course of action." Accordingly, *the Attorney General became less the government's lawyer and more an independent public official "responsible for justice*."

Marshall *supra*, 115 Yale L.J. at 2450 (footnotes omitted and emphasis added).

Thus, although the Attorney General represents the State and its agencies, she "also has a common law duty to represent the public interest." *Sec'y of Administration*, 367 Mass. at 163, 326 N.E.2d at 338; *see also State v. Lead Industries Assoc., Inc.*, 951 A.2d 428, 471 (R.I. 2008) ("Unlike other attorneys who are engaged in the practice of law, the Attorney General has a common law duty to represent the public interest.") (citations omitted).

> As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, *he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest*.

Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268–69 (5th Cir. 1976) (quoted in *Superintendent*, 558 A.2d at 1200) (emphasis added).

"Because of the multiple duties imposed on the office, the status of the Attorney General is unique." *Superintendent*, 558 A.2d at 1202.

> As a member of the bar, he is subject to the ethical standards of the bar, but he is also a constitutional officer charged with common law and statutory duties and powers. As an officer of *government he is directed to control and manage the litigation* of the State by providing counsel to state agencies and *by approving the retention of private counsel*. *Of at least equal importance, however, is his role as the legal representative of the people of the State in pursuing the public interest*.

Id. (emphasis added). "It is undisputed that at common law the Attorney General did not represent every state official nor was he required to do so." *Id*. at 1200.

"Moreover, the Attorney General and his staff are not the equivalent of a private law firm." *Id*. at 1203. Because the Attorney General has the additional responsibility to act as the State's chief legal officer in what she perceives to be the public interest, she is not obligated to follow blindly the instructions or the Governor or a state agency. In a case relied upon by the Law Court in *Superintendent*, the Massachusetts Supreme Judicial Court held that the Attorney General could refuse to take an appeal requested by the Governor and a state agency, observing:

> Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.

Sec'y of Administration, 367 Mass. at 163, 326 N.E.2d at 338. Similarly, in another case relied upon by the Law Court, the Massachusetts Supreme Judicial Court held that the Attorney General could take an appeal over the objections of the state agency. *See Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977) (cited in *Superintendent*, 558 A.2d at 1200); *see also Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (private parties lack standing to appeal invalidation of California same sex marriage ban); *see generally* Katherine Shaw, *Constitutional Nondefense in the States*, 114 Colum. L. Rev. 213 (2014) (State Attorneys General refusal to defend state laws); Jeremy R. Girton, *The Attorney General Veto*, 114 Colum. L. Rev. 1783 (2014) (same).

In sharp contrast to the federal model, in which the Attorney General serves at the pleasure of the President, the Attorneys General in 48 states, including Maine, do not serve at the pleasure of the Governor. *See* Marshall *supra*, 115 Yale L.J. at 2452. "Not surprisingly, a divided executive creates substantial opportunities and incentives for conflict." *Id*. at 2453 (footnote omitted). "Governors tend to view attorneys general as subservient officers." *Id*. "But most attorneys general, while acknowledging some obligation to represent the Governor and the other parts of state government, tend to perceive their overriding obligation to be to the broader concerns of representing the state, the law, and the public interest." *Id*. (footnote omitted).

> The authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth *has the concomitant effect of creating a relationship with*

> *the State officers he represents that is not constrained by the parameters of the traditional attorney–client relationship*.

Feeney, 373 Mass. at 366, 366 N.E.2d 1266 (citation omitted and emphasis added).

The *Feeney* Court also noted an important practical reason to vest the exclusive power over litigation in the Attorney General, namely, to allow the Attorney General to set consistent state policy guided by the public interest instead of allowing every state agency, with its own parochial interests, to pursue narrow and conflicting policies:

> It would also enervate the Legislature's clearly articulated determination to allocate to the Attorney General complete responsibility for all the Commonwealth's legal business. To permit the Commission and the Personnel Administrator, who represent a specialized branch of the public interest, to dictate a course of conduct to the Attorney General would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy for the Commonwealth.

Id. (citation omitted). This is not a trivial concern. If every state agency could demand that its priorities be litigated by its own counsel in the state courts without the Attorney General determining if such litigation is in the public interest, whether it is the unlicensed practice of cosmetology, or any of dozens of other issues, then the Court would confront on a regular basis the specter of the "State" taking inconsistent positions on inconsequential issues. Likewise, if every state agency could demand that its own counsel appeal every adverse trial court ruling without the Attorney General determining if such an appeal is in the public interest, the Court would confront numerous marginal appeals. The Attorney General's determination that the litigation or

the appeal is in the public interest enables the State to present "a uniform and consistent legal policy," *id*., which is an important service to the courts as well as the State.

"What is remarkable, then, in reviewing the state experience, is that debilitating conflict has not materialized." Marshall *supra*, 115 Yale L.J. at 2454. In other words, although the Governor may not appreciate the Attorney General expressing her independence, not only is that the dictate of centuries of law from England, this country, and the Law Court, it is a legal principle that works.

In upholding the Attorney General's broad control and discretion over litigation, the Law Court also relied upon the broad statutory authority granted to the Attorney General by the Legislature. *See Superintendent*, 558 A.2d at 1200. The governing statute provides:

> The Attorney General or a deputy, assistant or staff attorney shall appear for the State, the head of any state department, the head of any state institution and agencies of the State in all civil actions and proceedings in which the State is a party or interested, or in which the official acts and doings of the officers are called into question, in all the courts of the State and in those actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either House of the Legislature. *All such actions and proceedings must be prosecuted or defended by the Attorney General or under the Attorney General's direction*. ... All legal services required by those officers, boards and commissions in matters relating to their official duties must be rendered by the Attorney General or under the Attorney General's direction. *The officers or agencies of the State may not act at the expense of the State as counsel, nor employ private counsel except upon prior written approval of the Attorney General.* In all instances where the Legislature has authorized an office or an agency of the State to employ private counsel, the Attorney General's written approval is required as a condition precedent to the employment.

5 M.R.S. § 191(3) (emphasis and ellipsis added). "Both the history of the enactment of section 191 and its plain language support our conclusion that the Legislature directed the Attorney General to control state litigation and consolidated control in his office without mandating representation in all cases." *Superintendent*, 558 A.2d at 1200.

Applying the holding of *Superintendent* and the plain language of Section 191, we turn to the Governor's questions.

B. The Executive Branch Must Obtain The Attorney General's Permission To Hire Outside Counsel To Represent A State Agency In A Lawsuit.

The Governor asks first whether the Executive Branch must obtain the approval of the Attorney General to hire outside counsel in cases in which the Attorney General refuses to represent the Executive Branch. *See* Governor's Letter at 3. The Justices need look no further than the statute: "The officers or agencies of the State may not act at the expense of the State as counsel, nor employ private counsel except upon prior written approval of the Attorney General." 5 M.R.S. § 191(3)(B). There is nothing ambiguous about this statutory requirement—the Department must seek the Attorney General's written approval to hire outside counsel. *See also Banta v. Clark*, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979) (applying similar statute to require prior written approval); *Frohnmayer v. State Accident Ins. Fund Corp.*, 294 Or. 570, 587, 660 P.2d 1061, 1071 (1983) (same). Moreover, since, "at [its] root[,]" this question only "seek[s] from the Justices an interpretation of an existing statute[,] [t]his creates grave doubts as to the existence of a solemn occasion." *Opinion of the Justices*, 396 A.2d 219, 225 (Me. 1979) (brackets added).

Additionally, this question presents the same situation as *Superintendent*. In that case, the Attorney General granted the Superintendent of Insurance written approval to hire outside counsel at the same time he intervened in court to oppose the position being taken by the Superintendent. *See Superintendent*, 558 A.2d at 1198. Although the Law Court quoted approvingly the holding of the Massachusetts Supreme Judicial Court that "the Attorney General's control of the conduct of litigation 'includes the power to make a policy determination not to prosecute the Secretary's appeal in this case[,]'" *id*. at 1200 (quoting *Sec'y of Administration*, 367 Mass. at 159, 326 N.E.2d at 336–37) (brackets added), it went on to note that "[w]e need not decide whether approval could be withheld for the employment of private counsel because of a disagreement over the public interest." *Superintendent*, 558 A.2d at 1200 (brackets added).

So, too, here. The Justices need not decide if the Attorney General could have withheld approval for the Department to hire outside counsel to litigate *Mayhew v. Burrell* in the First Circuit, or to file a petition for *certiorari,* because the Attorney General, in fact, granted the Department such written approval. *See* Governor's Letter at 2 (First Circuit appeal); Governor's Letter, Exhibit 2 (Supreme Court *certiorari* petition). Like *Superintendent*, it is immaterial that the Attorney General disagrees with the Department on the merits of the case, and intervened to express that view. Section 191 and *Superintendent* converge to compel the Department to obtain the Attorney General's written approval to hire outside counsel.

C. The Attorney General Does Not Forfeit Her Statutory And Common Law Responsibilities Over Litigation When She Intervenes To Oppose A State Agency.

The Governor's second question is ambiguous: "If the Attorney General intervenes to oppose a State agency in a lawsuit, must the Executive Branch still allow the Attorney General to direct that piece of litigation?" Governor's Letter at 3. If the Governor is asking whether the Attorney General will be "directing" the filing of the petition for *certiorari* in *Mayhew v. Burrell* by writing the petition or approving or disapproving the arguments in the petition, that misunderstands the nature of the *certiorari* process and the Attorney General's written approval to hire outside counsel. If, instead, the Governor is asking whether the Attorney General will be "directing" the litigation in *Mayhew v. Burrell* because the Governor will need to obtain additional written approval if and when the Supreme Court grants the *certiorari* petition, that is simply a reprise of the first question. It bears repeating that "[w]e have consistently declined to answer questions as to which we cannot determine the exact nature of the inquiry." *Opinion of the Justices*, 460 A.2d at 1346 (citations omitted and brackets added).

The Attorney General is not "directing" the filing of the petition for *certiorari* in *Mayhew v. Burrell* in any commonsense understanding of that term. Just as the Attorney General did not draft the Department's brief in the First Circuit, the Attorney General will not be drafting the *certiorari* petition.

Rather, the Department, seeking review of the adverse judgment of the First Circuit, will file the petition for *certiorari* as a petitioner. *See* Sup. Ct. R. 12(3). Unless the Attorney General joins the Department in the *certiorari* petition seeking Supreme Court review of the First Circuit (which obviously is not going to happen), because she was a party in the First Circuit, she is considered a respondent entitled to file papers in the Supreme Court. *See* Sup. Ct. R. 12(6). The Attorney General may, but does not have to, file a brief as a respondent in opposition to the Department's *certiorari* petition. *See* Sup. Ct. R. 15(1). Regardless of whether the *certiorari* petition is granted or not, the Department is considered the petitioner and the Attorney General is considered the respondent, and never the twain shall meet. The Attorney General is not "directing" the litigation in *Mayhew v. Burrell.*

If, instead, the Governor is suggesting that the Attorney General is "directing" the litigation because she informed the Governor that the Department will need additional written approval if and when the Supreme Court grants the *certiorari* petition that is a hypothetical question that does not constitute a "solemn occasion." *See Opinion of the Justices*, 460 A.2d at 1345. Moreover, as explained above, both Section 191 and the common law dictate that the Department obtain such written approval to retain outside counsel. The fact that it is a brief on the merits in the Supreme Court, as opposed to a *certiorari* petition in the Supreme Court, or a brief on the merits in the First Circuit, or even an appearance in small claims court in the Maine District Court does not matter

one whit: "The officers or agencies of the State may not act at the expense of the State as counsel, nor employ private counsel except upon prior written approval of the Attorney General." 5 M.R.S. § 191(3)(B).

If the Governor is concerned that the Attorney General will not approve the hiring of outside counsel if and when the Supreme Court grants the *certiorari* petition, and it is by no means obvious that this is the concern, the Attorney General did not suggest that would occur. In the letter approving the hiring of outside counsel to prepare the *certiorari* petition, the Attorney General states only that: "Should the U.S. Supreme Court grant the Department's petition for certiorari, then we would anticipate reviewing an additional estimate of the costs for the merits briefs and oral argument." Governor's Letter, Exhibit 2 at 1. That does not sound like the Attorney General is threatening to withhold written approval for the hiring of outside counsel.

If the Governor is concerned that the Attorney General will not approve sufficient funds for the merits briefs and oral argument, that is not only putting the cart before the horse, but that is assuming even the existence of the horse. *If* the Supreme Court grants the *certiorari* petition, which is unlikely, and *if* the Governor submits a budget, and *if* the Attorney General refuses to approve it, then and only then will the issue arise whether the Attorney General has acted appropriately in light of her view of the public interest. To repeat: "we will not answer questions that are tentative,

hypothetical and abstract." *Opinion of the Justices*, 2012 ME 49, ¶ 5, 40 A.3d at 932 (brackets and quotation omitted).

If the Governor is concerned that the Attorney General will demand too much information before approving the hiring of outside counsel, that, too, does not appear to be a live controversy. Although the Governor apparently objected to information that the Attorney General initially requested before approving the hiring of outside counsel to file the *certiorari* petition in *Mayhew v. Burrell*, the Governor and the Attorney General apparently resolved their differences. *See* Governor's Letter at 2 (after Department "refused to provide privileged narrative billing records, but provided amounts budgeted and paid to outside counsel instead," the Attorney General gave written approval to hire outside counsel). Once again, the Justices should not offer an advisory opinion about a past or future disagreement. *Opinion of the Justices*, 134 Me. 510, 513, 191 A. 487, 488 (1936).

Furthermore, there is nothing improper about the Attorney General insisting on conditions and a budget before approving the hiring of outside counsel. "Written approval" does not mean rubber stamp. *Cf. FPL Maine Hydro Energy LLC v. Dep't of Envirn. Protection*, 2007 ME 97, ¶ 42, 926 A.2d 1197, 1209 (agency's interpretation of statute reasonable to avoid "rubber stamp approval").

When State Attorneys General hire outside counsel, defendants and interest groups, such as the U.S. Chamber of Commerce, often criticize such hiring on the

grounds that the Attorney General does not exercise sufficient control over outside counsel, impose sufficient conditions on such counsel, or adequately limit the amount spent on such outside counsel. *See* Leah Godesty, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?* 42 Colum. J.L. & Soc. Probs. 587 (2009); *see also State v. Lead Industries Assoc., Inc*., 951 A.2d at 474–77 (requiring Attorney General control, veto power, and personal participation when Attorney General retains outside counsel on contingency fee basis); *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 38–39, 112 Cal. Rptr. 3d 697, 717–18, 235 P.3d 21, 38–39 (2010) (similar requirement when public entities hire outside counsel). Suffice it to say, the Governor is not entitled to a blank check when seeking the Attorney General's written approval to hire outside counsel.

To the extent that the Governor's second question is comprehensible and presents a live, immediate, controversy, the answer is the same—the Department must obtain the Attorney General's written approval to litigate the merits of *Mayhew v. Burrell* in the Supreme Court.

Conclusion

Interested Person Peter Brann respectfully requests that the Justices decline to answer the Governor's questions, or, in the alternative, answer both of them in the affirmative.

Dated: February 4, 2015

/s/ Peter J. Brann

Peter J. Brann
BRANN & ISAACSON
184 Main Street, P.O. Box 3070
Lewiston, ME 04243–3070
(207) 786–3566
pbrann@brannlaw.com

Attorneys for Interested Person Peter Brann

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015 I filed the foregoing document in accordance with the Chief Justice's Procedural Order, and I also mailed copies of the foregoing document to the Governor and the Attorney General.

/s/ Peter J. Brann
Peter J. Brann